

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1847

PAUL A. MASON, *Petitioner,*

v.

JANET BELL MCDOWELL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Your Petitioner PAUL A. MASON filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. He alleged, inter alia, that certain constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment were abridged by Exparte Order of a Pennsylvania court that denied his custody

of his daughter while at the same time there was an appropriate order of custody in effect which had been granted by a court of proper jurisdiction from the state of Alabama.

The District Court dismissed the verdict on three separate alternative theories, one being that the case was moot because the Exparte Order that had been filed by the state court had expired; also that the Petitioner had not exhausted his state remedies and further that the vehicle of a Federal Habeas Corpus is not available to challenge a child custody order entered by a state court.

A timely appeal was taken to the United States Court of Appeals of the Third Circuit and an opinion which is attached hereto affirmed the Order of the District Court on the ground that the Petitioner had not Exhausted his state remedies.

Accordingly, your Petitioner brings this matter before the Supreme Court of the United States requesting that the court considered the merits of his Petition, since several federal questions and constitutional issues of significant and far reaching importance are involved in this case.

STATEMENT OF ISSUE

WHETHER OR NOT, a Writ of Certiorari should be granted under circumstances where Petitioner's constitutional rights to due process and equal protection under the Fourteenth Amendment have been violated by a state court which issued an Exparte Order of Court which had the effect of changing the substantive rights of the parties to the Order of Court without first being granted the opportunity to have a hearing on the merits of the case involved.

ARGUMENT

Jurisdiction of the Supreme Court of the United States and of the entire Federal Court structure in this matter is invoked under 28 U.S.C. Section 2241-55. Although the Third Circuit Court of Appeals believed, as did the District Court that the Petitioner has not exhausted his state remedies, had once again outlined for the court the fact that the state remedies have been exhausted insofar as this issue is concerned.

The Order of Court complained of was issued without a hearing being granted and there is no question over that fact. Furthermore, PAUL A. MASON filed Preliminary Objections to the Petition and those Preliminary Objections were dismissed. Raised in the Preliminary Objections the question of jurisdiction and also the violation of his constitutional rights were orally raised before the court and they were denied. An appeal was taken to the Superior Court of Pennsylvania and the lower court was affirmed without opinion and a Petition was filed with the Supreme Court of Pennsylvania and it was also denied. Thus, MR. MASON was faced with a situation where he had no further remedies to pursue in the state court insofar as this issue is concerned.

He then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania and as stated earlier in the Statement of the Case, same was denied and thus this appeal has been taken.

We would like to adopt the language of the Third Circuit Court of Appeals in its opinion where the court stated "We do not wish to be perceived as diminishing in any way the seriousness of the constitutional injury alleged. Certainly, the deprivation of a father's right to

the custody and companionship of his child is a serious matter. However, in the posture of this case we have no way of knowing what reasons the state of Pennsylvania might advance for the necessity of *pendente lite* orders shifting custody without the procedures generally required by the due process clause of the Fourteenth Amendment."

Without question, the Third Circuit Court of Appeals has recognized that MR. MASON did suffer a violation of his rights. We cited as authority in that direction, *Stanley* v. *Illinois 401 U.S. 645 (1971); Board of Regents* v. *Roth 408 U.S. 564 (1972),* where the Supreme Court of the United States has held on more than one occasion, that a person is deprived of a protected interest when he is not afforded an opportunity for some kind of hearing in which to present the merits of the case. Furthermore, in the case of *Matthews* v. *Eldridge, 424 U.S. 319 (1976),* the Supreme Court recognized that in order to identify the dictates of due process, a court must generally consider the private interests affected by official action and further the risk or ironous deprivation of such interests through procedures used and which were used in this case by the state of Pennsylvania.

Accordingly, we are petitioning this court to grant the Writ of Certiorari to rule upon the issue of whether or not in fact, MR. MASON had been denied the free exercise of his constitutional rights by the conduct of the Court of Common Pleas of Allegheny County, and furthermore, that the vehicle of the Writ of Habeas Corpus is an appropriate means by which MR. MASON could attack the deprivation of those constitutional rights in the Commonwealth of Pennsylvania, and for these reasons we ask the court to grant this Writ, so that this case may be heard on its merits.

CONCLUSION

In conclusion, Petitioner requests this Honorable Court to grant the Writ as aforesaid and that his plea not fall upon deaf ears, since we have been before three appellate courts and two trial courts and no one has specifically addressed constitutional issues which we raise herein and which we believe to have been properly raised in all other courts but for some reason our arguments fall upon deaf ears and we request this Honorable Court to grant the Writ, so that the merit may be brought before it.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1872

PAUL A. MASON, *Appellant,*

v.

JANET BELL MCDOWELL

On Appeal From The United States District Court For The Western District Of Pennsylvania
C.A. No. 79-0224

Argued January 11, 1980

Before SEITZ, *Chief Judge,* ADAMS and WEIS, *Circuit Judges*

(Filed January 31, 1980)

ELMER S. BEATTY, JR., ESQ.
(Argued)
Doherty, Heck, Robb & Beatty
Pittsburgh, Pennsylvania
Attorney for Appellant

RAYMOND RADAKOVICH, ESQ.
(Argued)
Frank & Radakovich
Pittsburgh, Pennsylvania
Attorney for Appellee

OPIONION OF THE COURT

PER CURIAM.

Paul Mason filed a petition for a writ of habeas corpus in the district court contending that his rights undr the due process and equal protection clauses of the Fourtheenth Amendment were abridged by an *ex parte* order of a Pennsylvania court that denied him custody of his daughter. The district court dismissed the writ on three separate, alternative theories. (1) The case was moot because the *ex parte* order that had been filed by the state court had, under its temporal terms, expired. (2) The petitioner had not exhausted state remedies as required by 28 U.S.C. 2254(b), (c) (1976). And (3) federa habeas corpus is not available to challenge a child custody order entered by a state court. We affirm only on the second ground.

I.

The parties were divorced in 1975 by an Alabama court, which granted custody of the older child, then four years old, to the father (Mason) and custody of the younger child, then a year old, to the mother (McDowell). Both parents received reasonable rights of visitation. Mason subsequently moved to West Virginia, and McDowell went to Pennsylvania. After a weekend visit in March 1976, the older child was not returned to her father. McDowell filed a complaint for custody in the Allegheny County Court of Common Pleas. Without notice or an opportunity for a hearing, Mason was enjoined by that court on March 15 "from making any attempts to take either child or both children from the custody of their mother" and from "removing the children from this jurisdiction." The injunction was to be effective "pending a proper hearing," ordered to take place on May 25.

In "Preliminary Objections" filed May 24, Mason challenged the personal jurisdiction of the Pennsylvania court on the basis of improper service of process, and raised the defense that the Alabama decree was res judicata. The first claim apparently was abandoned at the hearing held on the preliminary objections, and the Court of common Pleas held

as to the second objection that res judicata does not apply to child custody decrees.[1]

That decision was appealed to the Pennsylvania Superior Court, which affirmed per curiam, and a petition for allocatur was denied by the Pennsylvania Supreme Court. There is no indication that the federal constitutional claims asserted in the petition for habeas were ever raised in the state courts, and the petitioner did not pursue his appeal from the state's highest court to the United States Supreme Court.

II.

The district court held the petition to be moot because the *ex parte* order of which Mason complains expired by its own terms on May 25, 1976, the date a hearing was scheduled. It noted that the order entered by the Court of Common Pleas provided that it would expire after a "proper hearing," and such a hearing never occurred. That a date was ordered for a hearing does not, without further exploration of the facts, show that the injunction has expired. Even if the *ex parte* injunction had expired, it is likely that — given the generally short-term nature of these orders — this case would nevertheless be justiciable as one "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911). *See In re Establishment Inspeciton of Whitaker Corp.,* No. 79-1120, slip op. at 8-9 (3d Cir. Nov. 16, 1979). The fact is, however, that a final hearing on the merits of the child custody case has not been held, the injunction appears therefore to have continuing effect, and the alleged constitutional injury lingers: Mason was deprived of the custody of one of his children without notice or the opportunity for a hearing.

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[1] *Cf.* May v. Anderson, 345 U.S. 528 (1953) (foreign state's child custody decree not entitled to full faith and credit because it would be subject to modification in that jurisdiction). The problems spawned by that case and illustrated here were prophesied in Hazard, May v. Anderson: *Preamble to Family Law Chaos,* 45 Va. L.Rev. 379 (1959).

III.

The petition alleged jurisdiciton of the district court under 28 U.S.C. §§ 2241-55 (1976). Inasmuch as the child is alleged to be illegally "in custody pursuant to the judgment of a state court,"[2] it is to the requirements of § 2254 that we look. Subsection (b) states that the writ "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." The meaning of the exhaustion requirement is elaborated in subsection (c) as follows: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

There is no indication, either in the pleadings or in the record as a whole, that Mason has ever brought his constitutional claims before a state court.[3] We therefore hold that he

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[2] The question whether a child whose custody has been changed from one parent to another pursuant to a state court order is "in custody" for purposes of § 2254 proceedings is a very difficult one that need not be decided on this appeal, since we hold that dismissal of the petition was proper on a more settled ground. *Cf.* Jones v. Cunningham, 371 U.S. 236, 239-40 (1963) (noting expansiveness of definition: habeas corpus has been used to seek a remedy for variety of restraints on liberty).

[3] The possibilities of state relief were not briefed by the parties, but we note that state remedies at the time this action was instituted might have included a state habeas corpus proceeding, *see* 12 Pa. Stat. Ann. § 1888 (Purdon's 1967) (extending provision for writ of habeas corpus in criminal matters "to all [noncriminal] cases where any person . . . shall be confined or restrained of his or her liberty, under all color or pretense whatsoever") (current version at 42 Pa. Con. Stat. Ann. §§ 6501-05 (Purdon's 1978 Pamphlet)), or an action for declaratory and injunctive relief, *see* 12 Pa. Stat. Ann. §§ 831, 838 (Purdon's 1967) (granting courts of record "power to declare rights, status, and other legal relations whether or not further relief is or could be had" and permitting grant of further relief based on declaratory judgment) (current version at 42 Pa. Con. Stat. Ann. §§ 7532, 7538 (Purdon's 1978 Pamphlet)).

has not exhausted available state remedies as the statute requires, and that dismissal of the writ was proper on this ground. Consequently, we need not reach or express any view regarding the third reason given by the district court: that habeas corpus cannot be used to attack the order at issue in this case.[4]

IV.

In affirming the district court's dismissal of the petition for writ of habeas corpus, we do not wish to be perceived as diminishing in any way the seriousness of the constitutional injury alleged. Certainly the deprivation of a father's right to the custody and companionship of his child is a serious matter.[5] However, in the posture of this case we have no way of knowing what reasons the State of Pennsylvania might advance for the necessity of *pendente lite* orders shifting custody without the procedures generally required by the due process clause of the Fourteenth Amendment.[6] Whatever

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[4] The district court in holding that habeas corpus was not assertible here relied on *Donnelly* v. *Donnelly,* 515 F.2d 129 (1st Cir. 1975). The Court in *Donnelly* stated that the writ of habeas corpus could not be used to attack state custody orders. The petitioner sought visiting rights that had been suspended by the state court. There is no indication what federal law or constitutional right was alleged to have been violated by the state court action. The present petition, however, does not attack the merits of the custody order, but the procedure by which it was granted. *Cf.* Fuentes v. Shevin, 407 U.S. 67 (1971) (state replevin provisions allowing seizure of chattels without notice or opportunity for hearing violate Fourteenth Amendment); Conover v. Monemuro, 477 F.2d 1073 (3d Cir. 1973) (federal abstention that might generally preclude inquiry into operation of state juvenile court does not apply when its procedures are challenged on due process or equal protection grounds); Magaziner v. Montemuro, 468 F.2d 782, 787 (ed Cir. 1972) (abstention doctrine applies to domestic relations cases, except when equal protection considerations are present).

[5] *See, e.g.*, Stanley v. Illionis, 405 U.S. 645 (1971).

[6] *See* Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972) ("before a person is deprived of a protected interest, he must be af-

merit Mason's constitutional claim may have, it may not be considered in view of the posture of the controversy. Accordingly, we will affirm the dismissal of the petition for habeas corpus without prejudice to any further action the petitioner may wish to initiate.

TO THE CLERK:

Kindly file the foregoing per curiam (not for publication).

Circuit Judge

DATED:

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forded opportunity for some kind of hearing, 'except for extraordinary situtations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' ") (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *cf.* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (to identify dictates of due process, a court must generally consider private interest affected by official action, risk of erroneous deprivation of such interest through procedures used and probable value of additional procedures, and fiscal or administrative burdens of additional procedures).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1872

PAUL A. MASON, *Appellant*

v.

JANET BELL MCDOWELL

(D.C. Civil No. 79-0224)

On Appeal From The United States District Court For The Western District Of Pennsylvania

Present: SEITZ, *Chief Judge* and ADAMS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on January 11, 1980.

On consideration whereof, it is now here ordered an adjudged by this Court that the judgment of the said District Court, filed April 25, 1979, be, and the same is hereby affirmed in accordance with the opinion of this Court. Costs taxed against appellant.

ATTEST:

/s/ M. ELIZABETH FERGUSEN
Chief Deputy Clerk

January 31, 1980